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2002 AOC/DPA WORKGROUP

FINDINGS AND RECOMMENDATIONS

Final Report
June 2002

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The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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FROM THE EDITOR...

Ed Monahan

We seldom do special issues of *The Advocate*. We have never done a 7th issue of *The Advocate* in any year. This issue will in effect be the 7th issue in 2002 and it is **very** special in that we present a significant Report for not only public defenders but also for the courts, prosecutors, pretrial release officers, citizens and clients.

The Blue Ribbon Group for Improving Indigent Defense for the 21st Century (BRG) recommended that the Court of Justice, the Administrative Office of the Courts and the Department of Public Advocacy work together to insure appropriate public defender appointments in its Recommendation No. 11: "**Public Defender Services are Constitutionally Mandated while Resources are Scarce. It is Important for all Eligible Persons who want to be Represented by a Lawyer, but only those who are Eligible to be Appointed a Public Defender. The Court of Justice, and Especially AOC and DPA are Encouraged to work Cooperatively to Ensure Appropriate Public Defender Appointments."**

The BRG had a broad cross section of Kentucky Criminal Justice leaders, including, the Chief Justice, the former Chief Justice as Co-chair, a District Court Judge and a Commonwealth Attorney.

Public Advocate Ernie Lewis and AOC Director Cicely Lambert formed an AOC/DPA Workgroup to implement Recommendation No. 11. At AOC's request, pretrial release was added to the Workgroup's agenda. The Workgroup consisted of significant leaders in the Court of Justice, AOC and DPA. The Workgroup met from November 2001 until June 2002, and has made significant Findings and Recommendations.

These historic Findings and Recommendations are presented in this special additional *Advocate* because of their importance and in order to advance what the Workgroup called for in its conclusion: **The AOC/DPA Workgroup urges implementation of these Eligibility and Pretrial Release Recommendations for the benefit of the Kentucky Criminal Justice System and the people of Kentucky.**

Please provide us with your thoughts on how these Recommendations can be effectively implemented.

Edward C. Monahan
Editor

1. Introduction

In 1999, the *Blue Ribbon Group on Improving Indigent Defense in the 21st Century* (Blue Ribbon Group) found that the Department of Public Advocacy (DPA) was one of the lowest funded public defender agencies in the United States but that "public defender services are constitutionally mandated" even while resources are scarce. Members of the *Blue Ribbon Group* included Chief Justice Joseph E. Lambert, Jefferson District Court Judge Denise M. Clayton, Phillip R. Patton, Barren County Commonwealth Attorney, and was co-chaired by Secretary of the Justice Cabinet and former Chief Justice Robert F. Stephens. *The Blue Ribbon Group* stated that it is important that all eligible persons desiring counsel be appointed a public defender and equally important that only those eligible be appointed counsel. The Court of Justice (COJ), the Administrative Office of the Courts (AOC) and DPA were encouraged to work cooperatively to ensure appropriate public defender appointments.

In response to this finding, the Administrative Office of the Courts and the Department of Public Advocacy agreed to establish a Workgroup to look at issues pertaining to eligibility and appointments. In addition, at the request of AOC, the Workgroup agreed to examine issues pertaining to pretrial release.

The AOC/DPA Workgroup consisted of officials of AOC and DPA, as well as 6 district court judges. The AOC/DPA Workgroup met 5 times during late 2001 and early 2002 for over 12 hours of discussions.

Members of the Workgroup were: Cicely Lambert, Melinda Wheeler, Ed Crockett, Mike Losavio, Jacquie Heyman, Judge George Davis, Judge Mike Collins, Judge Carl Hurst, Judge Bruce Petrie, Judge John Knox Mills, Judge William P. Ryan (Judge Deborah DeWeese in his absence), Ernie Lewis, Judy Campbell, Ed Monahan, Jim Cox, Lynda Campbell, Scott West, Rob Sexton, Joseph Barbieri, Dan Goyette, and George Sornberger. The Findings and Recommendations contained in this document reflect the consensus opinion of this workgroup and do not necessarily represent the positions of organizations with which members are affiliated.

The AOC/DPA Workgroup has agreed on the following Findings and Recommendations.

2A. Findings on Eligibility

1. *Gideon v. Wainwright*, 372 U.S. 335 (1963) establishes that those who are "financially unable to employ counsel" must be provided counsel by the state. *Alabama v. Shelton*, 122 S.Ct. 1764 (2002) has recently affirmed *Gideon* by holding that an accused is entitled to the guiding hand of appointed counsel even where the court intends to impose only a suspended sentence.

2. The time immediately after the arrest until he or she appears in front of a magistrate is a particularly important time to ensure that a variety of safeguards are taken. *ABA Standards for Criminal Justice Providing Defense Services*, 3rd Edition (1992) in Standard 5-6.1 states that "Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, which occurs earliest."

3. One of the primary reasons for providing counsel at the earliest possible time is to enable the attorney to perform her duties of attempting to secure pretrial release. Guideline 2.1 of the *NLADA Performance Guidelines for Criminal Defense Representation* (1995) states that the "attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client." The Commentary notes why this is important: "The importance of counsel's early entry into criminal proceedings for the purpose of seeking bail has been noted in caselaw. The client's freedom on bail is important to counsel's representation of the client during the investigative /preparatory stages of the case."

4. RCr 3.05 requires counsel to be appointed "where the crime of which the defendant is charged is punishable by confinement and the defendant is financially unable to employ counsel."

5. KRS 31.100(3)(a) requires counsel to be appointed for a person "who at the time his need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation."

6. KRS 31.120 recently was revised by the 2002 General Assembly. Several additional factors have been listed for the court to consider in determining whether an individual is a needy person for the purpose of appointment of counsel. The provision establishing certain factors as "*prima facie* evidence that a person is not indigent or needy" has been repealed and is no longer part of the revised statute.

7. Waivers of counsel are legitimate so long as KRS 31.140 is followed. When advising accused persons in a group setting, the Court should thereafter individually inquire of each defendant whether counsel is desired. "The court shall consider such factors as the person's age, education, and familiarity with English, and the complexity of the crime involved." KRS 31.140

8. House Bill 146 of the 2002 General Assembly establishes that all children who are charged with a felony or a sex offense or whose liberty is to be taken away have a mandatory right to counsel that cannot be waived.

9. KRS 431.515 requires pretrial release officers "where practical, to assist in the earliest possible determination of whether a person is a needy person under KRS Chapter 31."

10. *Fraser v. Commonwealth*, Ky., 59 S.W.3d 448 (2001) states that the decision to appoint a public defender for an indigent accused is a judicial rather than a legislative responsibility. However, *Fraser* also holds that the General Assembly can establish other eligible clients for public defender services if the General Assembly is willing to fund the additional responsibility.

11. *West v. Commonwealth*, Ky., 887 S.W. 2d 338 (1994) allows for counsel to participate at the suspicion stage under KRS 31.110(1).

12. The eligibility determination is a vital stage of criminal proceedings. There is an inherent tension at this stage between the need for uniformity among all courts and the retention of discretion by the judge. It is important that the decision to appoint counsel or not be made by a judge using his/her informed discretion and utilizing sufficient facts to make a reasonable decision.

13. Neither the under-appointment nor the over-appointment of public defenders is a responsible use of public resources.

14. The timing of the filling out of the affidavit of indigency can effect significantly the quality of the information in the affidavit.

15. There is no mechanism in place at the current time to verify information on the affidavit of indigency. Further, there is no method in place to notarize the affidavit or provide necessary assistance to defendants in completing the form.

16. Pretrial release officers do not now interview juvenile clients, and thus affidavits of indigency are not being completed for most juveniles. Juvenile judges through the use of questioning are making eligibility determinations.

17. Filling out the affidavit of indigency operates as a request for counsel.

18. DPA directing attorneys, heads of urban offices, and contract administrators are in a unique position to communicate with judges regarding any perceived problems with the appointing practices and procedures in particular courts.

19. Some persons arrested in Kentucky are held without a probable cause determination before a judge within 48 hours of being arrested.

2B. Findings on Pretrial Release

1. The creation of a more equitable system of pretrial release for Kentucky has enhanced our system of criminal justice. The previous system of commercial surety resulted in release decisions based solely on financial resources in lieu of community interests. Risk of flight and danger to the community are not necessarily reduced by imposing financial standards on the defendant.

2. The comprehensive analysis in Kentucky on all types of release, both financial and nonfinancial, demonstrate that nonfinancial release appearances are more effective in returning defendants before the Court. *FTA Study, 54th Judicial Circuit*, by Ed Crockett, Kentucky AOC. National standards indicate failure to appear rates of 30% or greater compared to Kentucky's statewide rate of 8% *for nonfinancial release. Felony Defendants in Large Urban Counties*, BJS, (1998).

3. The Constitution of the Commonwealth of Kentucky Section 16 provides a right to bail: "All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great."

4. RCr 4.02 provides: "All persons shall be bailable before conviction, except when death is a possible punishment for the offense or offenses charged, and the proof is evident or the presumption is great that the defendant is guilty."

5. RCr 4.16(1) provides that bail "shall be sufficient to insure compliance with the conditions of release set by the court. It shall not be oppressive and shall be commensurate with the gravity of the offense charged. In determining such amount the court shall consider the defendant's reasonably anticipated conduct if released and the defendant's financial ability to give bail."

6. KRS 431.525(1) provides that bail should be (1) "sufficient to insure compliance with the conditions of release set by the court; (2) not oppressive; (3) commensurate with the nature of the offense charged; (4) considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and (5) considerate of the financial ability of the defendant."

7. The Kentucky Rules of Criminal Procedure have long recognized the need for expedited appeals of pretrial bail rulings to prevent hardships, inequities in release practices, and jail overcrowding.

8. The Pretrial Services Division of the Administrative Office of the Courts compiles information on the affidavit of indigency on defendants before the Court. Affidavits of indigency were obtained from 7% of those arrested in 1987 as compared to 22% in 2001.

3A. Recommendations on Eligibility

1. The decision whether to appoint a public defender should remain within the informed discretion of the judge before whom the charged person appears. This should include individuals who are in custody and persons who have been released on bond.

2. Individual rather than group questioning by the judge of the person at the first appearance should resolve the issue of whether the person is going to hire a private attorney, desires to have counsel appointed, is eligible to have counsel appointed, or desires to waive the appointment of counsel.

3. Information on access to counsel should be provided to all persons in custody by the court, by pretrial release officers and by the local public defender. See *ABA Standards for Criminal Justice Providing Defense Services*, 3rd Edition, Standard 5-8.1(1990).

4. The affidavit of indigency or an equivalent verbal colloquy should be required prior to appointment of a public defender whether the individual is in custody or on pretrial release and whether the person is an adult or a juvenile. Each jurisdiction should develop a protocol for bringing to the attention of the judge the affidavit of indigency.

5. The affidavit of indigency should be prepared at an interview when the defendant is not under the influence of alcohol or drugs or otherwise unable to rationally participate in the interview.

6. A mechanism should be in place to verify financial information when requested by the Court. In order to provide these services, the Pretrial Service Agency will need additional resources.

7. Appointing a public defender should be based solely on the financial circumstances of the accused person rather than any other factor such as whether the person is on bond or the expeditious processing of the court docket.

8. Waiver of counsel should occur only after an individualized colloquy with the court, and only after the court is assured that the defendant is fully informed regarding his right to counsel and the consequences of his waiver. The failure to request counsel should not be considered to be a waiver. See *ABA Standards for Criminal Justice Providing Defense Services*, 3rd Edition, Standard 5-8.2 (1990).

9. Counsel should report to the Court any information discovered which significantly and adversely affects a defendant's financial eligibility for court appointed counsel. However, counsel shall not report the information protected by the Kentucky Rules of Professional Conduct (SCR 3.130) or KRE 503 (lawyer-client privilege).

10. A point system may be used to determine eligibility such as the one used in Jefferson County. AOC, DPA and Judges should develop such an eligibility point system to be piloted in some jurisdictions.

11. Pretrial Services should increase the percentage of affidavits of indigency collection to 30% within 2002-2004.

12. The Fourth Amendment, *Riverside County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991) and *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) require that there be probable cause to detain an individual charged and arrested without a warrant for a criminal offense. Probable cause in this context means that the charging document properly states a criminal offense and that there is factual information to support the arrest of the particular individual who has been charged. This type of probable cause determination must be done within 48 hours and can be accomplished at or before arraignment by a review of the citation or post-arrest complaint or by a phone call between the pretrial release officer and the judge or trial commissioner. This probable cause determination is separate and apart from a preliminary hearing as required by RCr 3.10 & 3.14.

3B. Recommendations on Pretrial Release

1. Judges should have more information from Pretrial Release Officers than just basic interview information and points. Recommendations made by the Pretrial Release officers to the Judges should be broadened to include non-financial alternatives regardless of eligibility.

2. Pretrial Release Officers should intensify their efforts to apprise the Judges of defendants not released (subsequent to the current twenty-four hour review process) through frequent reviews with the judges about bond.

3. The waiver for the release of interview information and points to attorney of record should be incorporated into the current consent for interview. The order appointing counsel for the Defendant shall direct the pretrial officer to provide counsel with a copy of the pretrial services interview form.

4. There should be full review on the timing, collection and process for collecting information on the Affidavit of Indigency. A copy of the affidavit should be given directly to the Public Defender upon request of the defendant or entry of an order of appointment by the court.

5. The Court of Justice should analyze the current forfeiture process for secured and unsecured bail in the Commonwealth of Kentucky.

6. AOC should conduct pilot projects to analyze the effectiveness of the point system as a predictor of appearance in urban, suburban and rural settings.

7. Notification procedures on pretrial appearances subsequent to arraignment of the defendant on non-financial releases should be increased.

8. An automated interview/case management process should be developed by AOC for information collected on defendants. An electronic means of sharing appropriate information, including the Affidavit of Indigency, should be developed in consultation with DPA.

9. Defendants should be represented by counsel at their arraignment where pretrial release is determined, and there should be adequate resources provided to support effective implementation of such representation by counsel for indigent defendants. Arraignment should be held expeditiously.

3C. Recommendations on Eligibility and Pretrial Release

1. Defenders, prosecutors, pretrial release officers, and judges should be educated by AOC, Prosecutor Advisory Council, and DPA education personnel on eligibility and pretrial release issues.

4. Conclusion

The AOC/DPA Workgroup urges implementation of these Eligibility and Pretrial Release Recommendations for the benefit of the Kentucky Criminal Justice System and the people of Kentucky.

THE ADVOCATE

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